Supreme Court, U.S.
FILED

941151 DEC 19 1994

OFFICE OF THE CLERK

(1)

CASE NO.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

Bertha Lee Footman and
Beresford Robinson,
Individually and as
Co-Personal Representatives
of the Estate of Charlene
I. Robinson, deceased,

Petitioners,

vs.

United States of America,
National Aeronautics and Space
Administration,

Respondents.
_____/

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph H. Williams, Esquire
Counsel of Record for Petitioners
Troutman, Williams, Irvin, Green & Helms, P.A.
311 West Fairbanks Avenue
Winter Park, Florida 32789
(407) 647-2277

47pp

QUESTIONS PRESENTED FOR REVIEW

I. When an unfunded instrumentality of the United States exercises its discretion to create, staff, and operate a swim facility, the government has a duty to use reasonable care to safeguard paying guests. When a small child drowns at that facility, in part because of the use of unqualified "lifeguards" and other negligent management of the facility, the lower courts' refusal to allow an action against the government based on the discretionary function exception to the Federal Tort Claims Act constitutes a departure from the accepted and usual force of judicial proceedings in direct conflict with authority flowing from this court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and with decisions of other United States Courts of Appeals.

II. When the government's uncontradicted evidence establishes that a low-level employee of an unfunded instrumentality of the United States is without discretion in matters affecting the social, economic, or political policy of the United States government in the management of a swimming facility in decisions involving the hiring of personnel and the day-to-day management of the facility, and the lower courts determined him to have possessed and exercised such discretion, then the lower courts departed from, or sanctioned the departure from, the accepted and usual force of judicial proceedings in conflict with this court's decisions in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991), Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984); and, Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988).

LIST OF PARTIES

Bertha Lee Footman

Tammy Footman

Beresford Robinson

Estate of Charlene I. Robinson, deceased

United States of America, National Aeronautics and Space Administration

TABLE OF CONTENTS

Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv-v
Reports of Opinions Delivered in the Case	1
Statement of Grounds for Jurisdiction	1
Statutes Involved in this Case	1
Statement of the Case	
Course of Proceedings	2-3
Statement of the Facts	3-8
Argument	
I.	9-14
II.	15-19
Conclusion	20
Appendix	

TABLE OF AUTHORITIES

CASES

Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988)	i, 15, 18
Braxton v. United States, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed. 2d 385 (1991)	14
Butler v. United States, 726 F.2d 1057 (5th Cir. 1984)	13
Caraballo v. United States, 830 F.2d 19 (2nd Cir. 1987)	13
Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953)	i, 15, 18
Denham v. United States, 834 F.2d 518 (5th Cir. 1987)	13
Huber v. United States, 838 F.2d 398 (9th Cir. 1988)	13
Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955)	i, 9, 10, 11, 12, 13, 14
Ingham v. Eastern Airlines, Inc., 373 F.2d 277 (2nd Cir. 1967)	13
Mandel v. United States, 793 F.2d 964 (8th Cir. 1986)	13
Ricer v. Sioux City Memorial Park Cemetery, Inc., 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955)	11
Rise v. United States, 630 F.2d 1068 (5th Cir. 1981)	13
Ross v. United States, 640 F.2d 511 (5th Cir. 1981)	13

Seaboard Coastline Railroad Company v. United States, 473 F.2d 714 (5th Cir. 1973) 13

United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991) i, 15, 16, 17

United States v. Ingham, 88 S.Ct. 295, 389 U.S. 931, 19 L.Ed. 2d 292 (1967) 13

United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984) i, 15, 18

Wiggins v. United States, 799 F.2d 962 (5th Cir. 1986) 13

RULES

834 F.2d 521 13

111 S.Ct. 1275 16

111 S.Ct. 1280 17, 19

111 S.Ct. 1281 17

350 U.S. 62 10

350 U.S. 64-65 10

350 U.S. 69 10

28 U.S.C.A. §§1346(b), 2671 3

28 U.S.C.A. §1254 1

28 U.S.C.A. §1346(b) 37

28 U.S.C.A. §2671 4

28 U.S.C.A. §2674 38

28 U.S.C.A. §2680(a) 10

REPORTS OF OPINIONS DELIVERED IN THE CASE

United States District Court for the Middle District of Florida: Case No. 92-0474-CIV-ORL-18. United States Court of Appeals for the Eleventh Circuit: Docket No. 93-3317.

STATEMENT OF GROUNDS FOR JURISDICTION

The United States District Court for the Middle District of Florida entered its Order in this cause on September 28, 1993, dismissing Petitioners' claims against the United States for lack of subject matter jurisdiction, on the ground that the United States' allegedly negligent acts fell within the discretionary function exception to the Federal Tort Claims Act's waiver of sovereign immunity. On September 20, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Order per curiam. No rehearing was sought.

Jurisdiction is conferred on this Court to hear this cause by Writ of Certiorari by 28 U.S.C.A. §1254.

STATUTES INVOLVED IN THIS CASE

28 U.S.C.A. §1346(b)

28 U.S.C.A. §2671

28 U.S.C.A. §2674

28 U.S.C.A. §2680(a)

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Petitioners, Bertha Lee Footman and Beresford Robinson, were the Plaintiffs in the U.S. District Court as the duly qualified Co-Personal Representatives of the Estate of Charlene I. Robinson, deceased [R4-78-9, IX(H)]. They presented a claim arising from the death of their daughter, Charlene Robinson, by drowning at KARS Park on Kennedy Space Center, Merritt Island, Florida on June 9, 1990 [R4-78-9, IXB]. The United States made no response [R4-78-9, IX(C)].

An amended complaint alleged the United States was responsible for the drowning of Charlene I. Robinson by virtue of the failure of its employees: (1) to hire certified lifeguards; (2) to provide lifeguards with in-house and recurrent training to develop life-saving skills; (3) to provide lifeguards with a means to obtain emergency and immediate backup response from EMS; (4) to develop a fail-safe system to keep unsupervised children from using the government's swim lake facility; (5) to identify the drowning victim and to respond to a potential emergency; (6) to immediately initiate CPR on the decedent and to use industry-defined CPR procedure; and, (7) to take recommended preventative measures in the face of previous drownings [R4-64-3, 4].

The United States claimed lack of subject matter jurisdiction over the action relying on the discretionary function exception to the Federal Tort Claims Act [28 U.S.C.A., §§1346(b), 2671, et seq. hereinafter referred to as the "FTCA"][R4-75-3, 4].

The United States District Court determined the discretionary function exception applied to the actions complained of; that sovereign immunity barred Plaintiffs' claims against the United States; and, dismissed Plaintiffs' claims against the United States for lack of subject matter jurisdiction [R5-93-1, 2]. The United States Circuit Court of Appeals, Eleventh Circuit, affirmed per curiam.

STATEMENT OF THE FACTS

On June 9, 1990, Charlene Robinson, a 7-year old female, was attending a picnic at KARS Park with her family, and drowned in the swim lake on the Park premises [R4-78-9, IX(E)]. She was a paying guest at the facility [R4-67-7, RS-52-32, Ex. 3][1].

The Park where Charlene Robinson died is on property of the United States occupied by the National Aeronautics and Space Administration [hereinafter "NASA"] at the Kennedy Space Center in Brevard, County, Florida [R4-78-10, IX(K)].

---

[1] The record designation "RS", refers to those portions of the record designated on the district court's civil docket, as being located in separate exhibit folders between the end of volume 2 and the beginning of volume 3 (pages 6-7 of the docket sheet).

The Park is operated by the NASA Exchange-KSC [hereinafter "the Exchange"], through its instrumentality, the Kennedy Athletic Recreation and Social Organization [hereinafter, "KARS"][R4-78-10, IX(L)]. The Exchange is a non-appropriated fund instrumentality of the United States of America [R4-78-10, IX(I), RS-51-45, Ex. 3]. The KARS organization is an element of the Exchange [R4-78-10, IX(J)]. The Exchange staffed the swim lake facility at KARS Park with lifeguards paid by the Exchange [R4-78-10, IX(M)]. Mitchell G. Tidwell, the Park Manager, and the lifeguards on duty at KARS Park were "employees of the government" within the provisions of 28 U.S.C.A., Section 2671 [R4-78-10, IX(N)].

The Exchange is mandated by management instructions to operate in the most efficient manner for the benefit of all NASA employees [RS-51-28, Ex. 2, attachment A-1, paragraph 1, attachment A-2, paragraph 2.b(3)]. No paid employee of the Exchange may be a member of the Exchange Council, the organization's policy-making body [RS-51-28, Ex. 2, attachment A-2, paragraph 2.b(4)]. The Council consists exclusively of NASA employees [RS-47-17].

KARS is an element of the Exchange promoting the morale and welfare of NASA employees of the Center [RS-51-28, Ex. 2, attachment B-1]. KARS is responsible for the development

and utilization of KARS Park Number 1 [RS-51-28, Ex. 2] [hereinafter, "the Park"].

Mitchell G. Tidwell was employed by the Exchange as Park Manager February 13, 1973 [RS-47-4]. When he was hired, the Exchange was looking for someone "handy" with woodworking and small electrical repairs [RS-47-12]. Tidwell's immediate supervision in June, 1990, was the KARS facilities' Director [RS-47-16], who reported directly to the Chair of the Exchange Council [RS-47-19].

The Park contains a swim lake, circular in shape and approximately 180 feet in diameter, fed from two artesian wells. The water is filtered and chlorinated. Photographs [RS-49-29, Ex. 2, p.p. H-1 to H-8] reveal the lake to be surrounded by a chain link fence approximately four feet in height with one entrance guarded by a gate which can be locked [RS-49-29, Ex. 2, p. H-5].

The operation of this swim lake by the Exchange and KARS goes back to the 1960's. A drowning occurred at the lake on May 17, 1970 [RS-48-9, Ex. 1]. On May 28, 1979, there was a second drowning at the swim lake [RS-48-9, Ex. 1, attachment 25].

Testimony concerning the involvement of the Exchange in personnel hiring decisions at the Park was conflicting. The Council Chairman [RS-54-9], testifying on behalf of the United

States [RS-54, Ex. 1], stated the Exchange Council never got involved in personnel hiring decisions at KARS Park [RS-54-23]. The President of KARS [RS-52-7], also designated to testify by the United States [RS-52, Ex. 1], stated that the Council made all the final determinations on staffing decisions [RS-52-14]. Tidwell managed the day-to-day operations at the Park [RS-52-12, 14].

The Chairman was the person who determined all policy questions and issues [RS-54-15]. The Exchange Council doesn't direct KARS in its day-to-day activities, it issues broad policy guidelines [RS-54-20]. The Operations Manager for the Exchange Council [RS-53-7], testifying for the United States [RS-53, Ex. 1], confirmed there is no direct supervision of KARS' activities by the Exchange Council [RS-53-10].

But the Exchange does exercise control over the operation of the swim lake. The Exchange, not Tidwell, sets the Park's budget [RS-53-12, 20, 21, 22, Exs. 2, 5, 6, 7]. Tidwell is not even allowed to manage the revenues generated by Park activities, but must turn them over to the Exchange [RS-47-24]. The Director of facilities [RS-51-49], designated to testify on behalf of the United States [RS-51, Ex. 1], confirmed the decision by the Council (not Tidwell) to pay lifeguards at the swim lake enough to be competitive with other places that employed lifeguards [RS-51-49, Ex. 4; RS-53-22, Ex. 6]. In a

May, 1988 Exchange Council meeting, the Director of Facilities was instructed by the Council to instruct lifeguards regarding attentiveness on the job [RS-51-50].

The Council also considered problems with people leaving children unattended in the pool with unauthorized flotation equipment [RS-51-56]; and emptying the pool of people and locking the gate into the enclosure while lifeguards took breaks [RS-51-57]. The Council also approved the installation of a water slide at the swim lake [RS-53-21, Ex. 5].

The subject of safety was one of paramount importance to the Exchange..."safety is the -- one of the highest items at KSC" [RS-51-114]. If the Exchange thought there was something unsafe about a facility, they would do something about it [RS-51-115].

On the subject of discretion, the United States testified as follows:

> Q. Is there anything discretionary about employing the highest standards of safety on KARS' facilities?
>
> A. No, I would not think so [emphasis supplied, RS-51-115].

The facilities Director testified he did not have the discretion to tolerate a condition at the Park that was life-threatening or potentially life-threatening [RS-51-127].

In June, 1990, the Exchange employed five lifeguards under Tidwell's supervision to provide protection for bathers using the

Park's swim lake [RS-47-81, 85]. The head lifeguard had worked as a lifeguard at the Park the previous year [RS-46-5]. He got his orders from Tidwell [RS-46-21]. In June, 1990, he was 17 years of age [RS-46-5]. The other four lifeguards were all hired in 1990 [RS-47-85, 86]. Tidwell did not even interview the new hires [RS-47-86].

The head lifeguard was allowed by Tidwell to "basically hire" the other lifeguards [RS-46-17]. Tidwell let him run that operation and did not exercise much control over him [RS-47-88]. Of the lifeguards on duty on June 9, 1990, four of the five had no lifeguard training at all [RS-46-6; RS-38-8; RS-37-15, 20; RS-39-9]. None had certificates [RS-40-9]. None of the lifeguards had current CPR certificates [RS-46-10; RS-40-13; RS-38-8; RS-39-11; RS-37-17]. Two of them had failed the CPR courses taken in high school [RS-37-17; RS-39-11].

The access to the swim lake was controlled by the chain link fence and the one gate [RS-49-29, Ex. 2, p. H-5]. On June 9, 1990, there were rules for use of the swim lake posted at the gate by the government. Tidwell did not post these rules. This was done by NASA Safety [RS-47-53]. Tidwell:

> ...I didn't like the rules. But I didn't have any say-so. You work for NASA, you don't have any say-so [RS-47-54].

ARGUMENT

I. When an unfunded instrumentality of the United States exercises its discretion to create, staff, and operate a swim facility, the government has a duty to use reasonable care to safeguard paying guests. When a small child drowns at that facility, in part because of the use of unqualified "lifeguards" and other negligent management of the facility, the lower courts' refusal to allow an action against the government based on the discretionary function exception to the Federal Tort Claims Act constitutes a departure from the accepted and usual force of judicial proceedings in direct conflict with authority flowing from this court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and with decisions of other United States Courts of Appeals.

The District Court, affirmed by the Circuit Court of Appeals, determined that, having made the discretionary determination to build, operate and staff a swimming facility on public property, the government did not owe the patrons of that facility any duty of reasonable care in the day-to-day operation of the facility because those day-to-day decisions somehow involved implementation of social, economic or political policies of the United States. This decision was a departure from the accepted and usual force of judicial proceedings, because it directly conflicts with the principle established by this Court in Indian Towing Company vs. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), that, where government voluntarily assumes a function not mandated by statute or regulation, it has an absolute duty to perform that function with reasonable care. In addition, the lower courts'

decision conflicts with the decisions of other circuit courts of appeals in very similar factual settings. The lower courts' departure from this Court's precedent and the conflicts engendered with other courts of appeals, require that the writ be issued and that this matter be accepted for full review.

In its decision in Indian Towing, this Court found liability for the negligent performance of a duty voluntarily assumed by the United States. There, claim was made against the government for the Coast Guard's negligent failure to service, maintain and repair a navigation beacon which malfunctioned, causing injury [350 U.S. 62]. The government conceded at the outset that the provisions of 28 U.S.C.A. §2680(a) were not involved in this fact situation and this Court noted, "hornbook tort law" that one who undertakes to warn the public of danger, inducing reliance, must perform that "good samaritan" task in a careful manner [350 U.S. 64-65]. Liability was found under this rationale:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light...and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act [350 U.S. 69].

In the present case, Petitioners have maintained before both lower courts that these ideals apply specifically to the circumstances surrounding their young daughter's death. There, the government exercised its discretion to create, operate and staff the swim lake facility with lifeguards. The government engendered reliance on the part of the public by limiting access to the facility, posting rules, and providing persons designated as "lifeguards" who were totally unqualified to perform that task. Having engendered that reliance, the government utterly failed to exercise the reasonable care which would have avoided this unnecessary death.

The government, through its instrumentality, was never required to create and operate this facility, but once that discretionary decision was taken, it was obligated to use due care to provide competent management and competent lifeguards, and even to discover the fact of its park manager's poor management of the facility. Those failures made the United States liable to Petitioners under the FTCA pursuant to the rationale in Indian Towing. The lower courts' disregard for the clear precedent of this court applied to this case mandates that this Court exercise its power of supervision.

Special and important reasons beyond the academic or the episodic require this Court's review. Ricer v. Sioux City Memorial Park Cemetery, Inc., 75 S.Ct. 614, 349 U.S. 70, 99

L.Ed. 897 (1955). The implications of this decision are much broader than the uncompensated personal tragedy which will occur if review is denied.

Any time a government agency voluntarily assumes responsibility for conducting an activity and performs that function negligently, causing injury, the government will seek to escape liability by application of the discretionary function exception to the day-to-day actions of employees of the government. This will result in an increased burden on the United States District Courts, and enormous expense to the individual litigants and to the government throughout the system.[2] Reasserting the holding in Indian Towing will avert those evils for other, similarly situated litigants; will restore uniformity in consideration of these questions in all Circuits; and, effect justice for these Petitioners.

As indicated above, the decisions of the lower courts conflict with decisions of other circuits concerning the exercise of discretion by the United States to voluntarily engage in a non-mandated activity. The "good samaritan" rule established by this Court in Indian Towing has been followed by several circuits in circumstances substantially similar to the facts in this

[2] For instance, the Petitioners here have incurred expenses of more than $45,000.00 preparing this case for trial before the Court's decision on the eve of trial. The government listed taxable costs of $8,562.50, but Petitioners would estimate the government's actual costs equalled or exceeded Petitioners'.

case: Ingham v. Eastern Airlines, Inc., 373 F.2d 277 (2nd Cir. 1967), cert. den. United States v. Ingham, 88 S.Ct. 295, 389 U.S. 931, 19 L.Ed. 2d 292 (1967); Caraballo v. United States, 830 F.2d 19 (2nd Cir. 1987); Seaboard Coastline Railroad Company v. United States, 473 F.2d 714 (5th Cir. 1973); Rise v. United States, 630 F.2d 1068 (5th Cir. 1981); Ross v. United States, 640 F.2d 511 (5th Cir. 1981); Butler v. United States, 726 F.2d 1057 (5th Cir. 1984); Wiggins v. United States, 799 F.2d 962 (5th Cir. 1986); Denham v. United States, 834 F.2d 518 (5th Cir. 1987); Mandel v. United States, 793 F.2d 964 (8th Cir. 1986); Huber v. United States, 838 F.2d 398 (9th Cir. 1988).

In all of these cases, the government voluntarily assumed a non-mandated duty and performed it negligently, as did the government in Indian Towing, and in this case. The Court in Denham stated the rationale more succinctly than even this Court, in considering a similar claim of immunity in a swimming facility accident:

> We do not believe that Congress intended one who was injured because of a danger negligently created by the (government) within a designated swimming area to have no legal remedy [834 F.2d 521].

To allow the lower courts in this case to preclude recovery to Petitioners because of negligence occurring years after the discretionary decision was taken to build and operate the

swimming facility, when that negligent operation caused Charlene Robinson's death, conflicts with all of these decisions from the other circuits holding, as did this Court in Indian Towing, that, once the discretionary decision to act is made, a duty arises to carry out that decision with the exercise of reasonable care. Review must be granted to harmonize the lower courts' decisions with the decisions of this Court and those of the other circuits on this question. Braxton v. United States, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed. 2d 385 (1991).

II. When the government's uncontradicted evidence establishes that a low-level employee of an unfunded instrumentality of the United States is without discretion in matters affecting the social, economic, or political policy of the United States government in the management of a swimming facility in decisions involving the hiring of personnel and the day-to-day management of the facility, and the lower courts determined him to have possessed and exercised such discretion, then the lower courts departed from, or sanctioned the departure from, the accepted and usual force of judicial proceedings in conflict with this court's decisions in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.ed. 2d 335 (1991), Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984); and, Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988).

In determining that a low-level employee of an unfunded instrumentality of the United States was exercising discretion affecting the social, economic or political policies of the United States, the lower courts ignored the government's uncontroverted documentary evidence and oral testimony that the employee in question did not possess that kind of discretion. The founding document of the organization employing the decision-maker specifically excluded the organization's employees from serving on the policy-making body. The District Court's analysis never acknowledged this uncontradicted evidence, and never came to grips with the internal inconsistency which this evidence created in its reasoning.

For purposes of this proceeding, these Petitioners concede that no mandatory regulations deprived the government

employee of discretion. However, Petitioners show that the level at which the employee operated and the type of decisions involved were not such as were intended by Congress to be protected under the discretionary function exception. The lower courts' application of that exception on these uncontroverted facts departed from the accepted and usual force of judicial proceedings and was in conflict with this Court's opinion in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed 2d 335 (1991).

As set forth in Gaubert, absent a claim that mandatory laws or regulations deprive the actor of discretion, analysis requires determining whether the discretion was exercised in furtherance of public policy goals [111 S.Ct. 1275]. In this case, the level of the employee involved is so low that he is only an "employee of the government" by courtesy of statutory definition. He is specifically excluded from serving on his employer's policy-making body by its founding charter. He is not allowed to set the budget for his park; nor even to manage receipts derived from users of the park.

In short, he is an employee who is only concerned with day-to-day management; not pondering the social, economic or political implications of his decisions. In this case, the lower courts are taking the position that persons who are not even receiving compensation from the United States Treasury are

making policy decisions affecting the health and welfare of this country's citizens. This is an unparalled departure from this Court's previous holdings on this subject. Petitioners' have been unable to find any other instance where the employee of an unfunded instrumentality was deemed to be exercising such discretion.

In his concurring opinion in this Court's decision in Gaubert, Justice Scalia described Maurice Tidwell as one of those government employees whose discretionary decision would not be protected by the discretionary function exception to the FTCA. Justice Scalia noted that the level at which the decision is made is relevant to the inquiry, since the question concerns both the subject matter and the office of the decision-maker [111 S.Ct. 1280]. Justice Scalia gave this example:

> ...One may also imagine a federal officer of relatively low level authorized to hire...by applying ordinary standards of business judgment, and not authorized to consider matters of government policy in the process. That hiring decision would not be protected by the discretionary function exception, even though some element of choice is involved [111 S.Ct. 1281].

Here, low-level federal officer, Maurice Tidwell, was specifically excluded by his employer's founding document from making policy. The government's uncontroverted testimony was that no one had the discretion to compromise the highest standards of safety on KARS facilities. Tidwell himself acknowledged his lack of discretion: "you work for NASA, you

don't have any say so." The day-to-day decisions he made were those that only applied ordinary standards of business judgment and thus were not protected by the discretionary function exception to the FTCA.

In allowing the District Court's fallacious reasoning to stand, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings, in resolving this important federal question. If this decision is allowed to stand, the government's responsibility to its citizens for the torts of its employees pursuant to the waiver of immunity is substantially eviscerated. The lower courts' decisions stand for the proposition that, when any employee of the government makes any discretionary decision which results in injury to a citizen, that decision is protected by the discretionary function exception.

This position by the District Court, affirmed by the Court of Appeals, also conflicts with the reasoning of this Court's prior holdings in Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed 2d 660 (1984); Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed 2d 531 (1988). If this reasoning is accepted and applied nationwide, then, the "universally acknowledged" exception to the discretionary function exception noted by Justice Scalia

[111 S.Ct. 1280], automobile negligence, will, as a practical matter be the only instance left where the government is responsible to its citizens for its negligent conduct.

There is nothing in the legislative history of this statute nor in this Court's long and thoughtful consideration of the circumstances governing its application which would support the application of the discretionary function exception to the facts in this case. The lower courts' faulty analysis is based on its ignoring uncontradicted documentary evidence and testimony given on behalf of the United States. These mistakes must be corrected to forestall other misapplications of the discretionary function exception to similar fact settings.

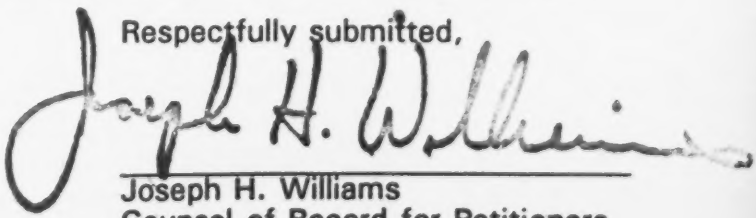
This case provides this Court with an opportunity to place a lower limit beyond which the discretion concerning implementation of the social, economic or political policy of the United States may not reach. Placing that limit would benefit all in the judicial system, courts and litigants, by introducing a standard by which future cases may be measured. This should also act to reduce future petitions to this Court on this subject.

CONCLUSION

The lower courts' actions in ignoring this Court's binding precedent and in coming to a conclusion which conflicts with decisions of other Circuit Courts of Appeals mandates that this Court issue its Writ of Certiorari to the Circuit Court of Appeals for the Eleventh Circuit. This Court must accept this matter for full review to reestablish in the Eleventh Circuit the principle that, when government voluntarily undertakes a non-mandated function, it owes the citizens of this country a duty to use due care in the performance of that function. If that duty is breached, as here, the government must answer to the victims of that breach in damages.

The lower courts' application of the discretionary function exception to the FTCA to make immune the acts of a low-level employee who is not even on the federal payroll, constitutues a serious departure from this Court's previous precedents applying that exception. This Court must issue its Writ of Certiori to the Circuit Court of Appeals for the Eleventh Circuit in order to review this action and establish a lower limit beyond which the exercise of this type of discretion may not reach.

Respectfully submitted,



Joseph H. Williams
Counsel of Record for Petitioners

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CONTENTS

Order of United States District Court, Middle District of Florida, Orlando Division, in case number 12-0474-CIV-ORL-18 A-1

Order of United States Court of Appeals for the Eleventh Circuit in case number 93-3317, entered September 20, 1994 A-13

Statutes Involved in this Case

28 U.S.C.A. §1346(b) A-15

28 U.S.C.A. §2671 A-15

28 U.S.C.A. §2674 A-16

28 U.S.C.a. §2680(a) A-17

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BERTHA LEE FOOTMAN & BERESFORD ROBINSON, Individually and as Co-Personal Representatives for the Estate of CHARLENE I. ROBINSON, deceased,

Plaintiffs,

v. Case No. 92-0474-CIV-ORL-18

UNITED STATES OF AMERICA & TAMMY FOOTMAN

Defendants.
_____/

ORDER

Plaintiffs allege that negligent acts of United States employees and Tammy Footman caused the death of Charlene I. Robinson. Plaintiffs bring their action against the United States pursuant to the Federal Tort Claims Act (FTCA), ch. 753, tit. IV, 60 Stat. 842 (1946) (current version in scattered sections of 28 U.S.C.). Plaintiffs filed motions for partial summary judgment on the United States' affirmative defenses that (1) the court lacks subject matter jurisdiction because the alleged negligent conduct falls within the discretionary function exception to the FTCA waiver of sovereign immunity and (2) the United States owed no actionable duty to Charlene I. Robinson. The United States responded in opposition to

plaintiffs' motions. Based on a review of the case file and relevant law, the court finds that the alleged negligent acts of the United States fall within the FTCA discretionary function exception, and thus, sovereign immunity bars plaintiffs' claims against the United States. Accordingly, the court dismisses plaintiffs' claims against the United States for lack of subject matter jurisdiction without reaching the issue of actionable duty. Furthermore, the court exercises its discretion to decline jurisdiction over plaintiffs' pendent state claim against Tammy Footman.

I. FACTS

The National Aeronautics and Space Administration (NASA) created the NASA Exchange - Kennedy Space Center (Exchange) to use and acquire real property and facilities for the benefit of NASA employees at the Kennedy Space Center. The Exchange is a non-appropriated fund instrumentality of the United States. The Exchange established the Kennedy Athletic, Recreation and Social (KARS) organization to promote recreational activities for NASA employees at the Kennedy Space Center. The KARS organization manages a recreational park known as KARS Park No. 1 (KARS Park). The United States, through NASA, owns the KARS Park property.

In 1973, the Exchange hired Mitchell Tidwell (Tidwell) as the park manager for KARS Park. (Tidwell Dep. at 4, 12-13.) The record provides no evidence that the Exchange or the KARS organization promulgated regulations to govern Tidwell's management of KARS Park. (Conway Dep. at 23, 31; Wynn Dep. at 25, 42.) After Tidwell began work at KARS Park, a maintenance worker at KARS Park informed Tidwell that Tidwell's responsibilities included management of the KARS Park swim lake facility. (Tidwell Dep. at 13-14.) Tidwell kept a copy of lifeguard instructions in a file in his office at KARS Park. (Tidwell Dep. at 56.) The KARS organization had drafted the lifeguard instructions in 1970. (Tidwell Dep. at 37, 55.) The lifeguard instructions addressed maintaining the swim lake area, training guards, times for clearing the swim lake, duties of the gate watcher, equipment, and rules and regulations for lifeguards. The instructions required, among other duties, that the lifeguards performed weekly drills and monthly training. (Doc. 26, Exs. E-K.)

In 1970, the swim lake facility was open six days per week and provided swimming and lifesaving lessons. (Tidwell Dep. at 37-38, 58.) Beginning in 1973, the swim lake facility was open only on weekends and did not provide swimming or

lifesaving lessons. (Tidwell Dep. at 38.) Tidwell revised the instructions to reflect that the swim lake facility was open only on weekends and continued to follow some of the instructions. However, in his deposition, Tidwell testified that he questioned whether the instructions were in force in 1990 and noted specific examples of instructions that did not apply to the swim lake facility after the 1973 changes. (Tidwell Dep. at 55-72.) The record provides no evidence that the KARS organization required Tidwell to enforce the 1970 lifeguard instructions. (Wynn Dep. at 25, 42.) The Exchange limited its involvement in the operation of the swim lake facility to specific matters brought to its attention. (Conway Dep. at 22-25.) The KARS organization posted rules for swimmers on the fence surrounding the swim lake facility. (Tidwell Dep. at 54; Doc. 26, Ex. L.)

Although the Exchange paid the lifeguards, Tidwell received no instructions regarding lifeguard qualifications. (Conway Dep. at 23, 31; Wynn Dep. at 16.) In 1990, Tidwell hired lifeguards without lifesaving or CPR certification. (Bradley Craig Dep. at 37.) The 1990 lifeguards did not conduct weekly drills or monthly training. (Tidwell Dep. at 59, 62.)

On June 9, 1990, Charlene I. Robinson, age seven, attended a picnic with her mother and stepfather at KARS Park.

Charlene I. Robinson's stepfather was a member of the local union that sponsored the picnic. The Exchange had granted the union permission to use KARS Park for its picnic and the union paid the Exchange for the use of KARS Park. Five lifeguards were on duty at the swim lake facility when Charlene I. Robinson was swimming. After a man discovered Charlene I. Robinson's body under water, two lifeguards participated in an attempt to resuscitate her while another lifeguard went to Tidwell's office to call for emergency medical service (EMS). (Docs. 37-40, Lifeguard Deps.) Charlene I. Robinson died from drowning.

In their original and amended complaints, plaintiffs allege that the United States is liable for the following negligent acts: (1) failure to hire lifeguards with industry accepted standard certifications; (2) failure to provide lifeguards with in-house and recurrent training to develop lifesaving skills; (3) failure to provide lifeguards with a means to obtain emergency and immediate backup response from EMS; (4) failure to develop a fail safe system to keep unsupervised children from using the swim lake facility; (5) failure of lifeguards to identify the drowning victim and to respond to a potential emergency; (6)

failure of lifeguards to immediately initiate CPR on Charlene I. Robinson and to use industry defined CPR procedures; and (7) failure of NASA to take recommended preventative measures in the face of previous drownings.

II. LEGAL DISCUSSION

A. The United States

The FTCA waives the United States sovereign immunity to liability for damages caused by the negligent or wrongful acts or omissions of its employees while acting within the scope of employment, under circumstances where the United States, if a private person would be liable in accordance with the laws of the place where the act or omission occurred. See 28 U.S.C. §§ 1346(b), 2674. Yet, the FTCA creates a discretionary function exception to the waiver of sovereign immunity, which excludes claims based on government employees' exercise or failure to exercise discretionary functions, whether or not the discretion is abused. See 28 U.S.C. 2680(a). The Eleventh Circuit recently summarized the Supreme Court analysis for the discretionary function exception. See Autery v. United States, 992 F.2d 1523, 1526-27 (11th Cir. 1993) (relying primarily on the Supreme Court decision in United States v. Gaubert, 111 S.Ct. 1267 (1991)). Pursuant to the holding in Autery, the

court must first determine whether the challenged conduct violates a mandatory regulation or policy that allowed no judgment or choice. See id. at 1526 (referring to a specifically prescribed course of action for an employee to follow). Second, if the challenged conduct involves an element of judgment, the court must determine whether the challenged actions are the kind of conduct that the discretionary function exception was designed to shield. See id. at 1526-27 (providing as an example of conduct that is grounded in judgment but not in public policy; a government official who drives an automobile on official business and negligently collides with another car is exercising discretion as to driving but that discretion is not grounded in regulatory policy).

1. Mandatory Regulations.

If a federal regulation requires that an agency take specific steps or allows no room for an official to exercise policy judgment in performing a given act, the alleged failure of an agency to take the mandatory steps or the alleged negligence of the official performing the given act are not within the discretionary function exception. See Berkovitz v. United States, 486 U.S. 531, 544, 546-67 (1988). However, the undisputed evidence in this action shows that no regulations

governed the decisions by NASA, the Exchange, the KARS organization, and Tidwell regarding hiring lifeguards, providing lifeguards with a means to obtain emergency and immediate backup response from EMS, developing a fail safe system to keep unsupervised children from using the swim lake facility, and taking recommended preventative measures in the face of previous drownings. Furthermore, the lifeguards received no specific directives regarding identification of drowning victims, response to potential emergencies, or performance of CPR. As to the 1970 lifeguard instructions, the court acknowledges that the instructions specifically directed the lifeguards to conduct weekly drills and monthly training and that in 1990, the lifeguards did not conduct weekly drills or monthly training. However, the court finds no evidence that the Exchange or KARS organization informed Tidwell that he was required to enforce the 1970 lifeguard instructions. Instead, the evidence shows that the Exchange and KARS organization allowed Tidwell unfettered discretion as to hiring and training lifeguards. Accordingly, the court finds that in 1990, the 1970 instructions were not mandatory regulations. Thus, the court must determine whether the challenged conduct is the kind of conduct that the discretionary function exception was designed

to shield. See Autery, 992 F.2d at 1529 (finding that because the tree inspection plan in effect at the time of the accident did not compel park employees to inspect certain trees on certain days or remove a particular number of trees per week, no mandatory regulation controlled the park employees' actions, and thus, the issue became whether the park employees' choices were grounded in social, economic, or public policy); cf. Phillips v. United States, 956 F.2d 1071, 1075-76 (11th Cir. 1992) (finding that although the Army Corps of Engineers used discretion and made policy judgments in designing and implementing its safety program at a construction site, the discretionary function exception did not apply to a cause of action out of the Army Corps inspectors' actual negligence in discharging the Army Corp's mandatory safety responsibilities).

2. Kind of Conduct.

Evidence that Tidwell and the lifeguards were performing operational functions, as opposed to planning functions, does not take their conduct outside the scope of conduct that the discretionary function exception was designed to shield. See id. at 1527-28 (recognizing that the Supreme Court has expressly rejected the proposition that the discretionary function exception does not reach decisions made at the operational or

management level). Moreover, the Eleventh Circuit has noted that, generally, decisions regarding what safety measures to employ involve balancing policy considerations. See id. at 1527 (referring specifically to safety, aesthetics, environmental impact, and available financial resources). The evidence shows that the park manager's decisions regarding hiring lifeguards, providing lifeguards with in-house training and a means to obtain emergency and immediately backup response from EMS, and developing a fail safe system to keep unsupervised children from using the swim lake facility involved safety factors and resource allocation. Similarly, NASA's decision whether to take recommended preventative measures in the face of previous drownings is the type of planning level decision that entails policy considerations. As to plaintiffs' challenge to the lifeguards' performance of their lifesaving duties, the evidence shows that plaintiffs' claims arise from Tidwell's policy decisions regarding the qualifications and training of the lifeguards, not from the lifeguards' negligence in failing to perform functions that they were qualified to perform. Thus, based on the discretionary nature of the decisions giving rise to the alleged negligent acts, the court dismisses plaintiffs' claim against the United States for lack of subject matter jurisdiction.

See id. at 1531 (finding that to decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park SErvice likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs the extent to which the natural state of the forest should be preserved, and the limited financial resources available); see also Gaubert, 111 S.Ct. at 1278-79 (finding that the day-to-day operation of a savings and loan by federal bank regulators involved furthering governmental policy through the exercise of their discretion to choose various courses of action in supervising the savings and loan); United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 820 (1984) (finding that the Federal Aviation Agency spot check system for airplane certification specifically empowered employees to make policy judgments regarding the degree of confidence placed in manufacturers, need to maximize compliance with regulations, and efficient allocation of agency resources).

B. Tammy Footman

Plaintiffs' cause of action against Tammy Footman arises under Florida tort law. Therefore, because the court disposes of plaintiffs' federal cause of action against the United States

before trial, the court declines to exercise jurisdiction over plaintiffs' pendent state claim against Tammy Footman. See Rice v. Branigar Org., Inc., 992 F.2d 788, 792 (11th Cir. 1991) (holding that if a court dismisses federal claims before trial, the court has discretion to dismiss pendent state claims).

III. CONCLUSION

Because the record shows that the United States' allegedly negligent acts fall within the discretionary function exception to the FTCA waiver of sovereign immunity, the court **DISMISSES** plaintiffs' claims against the United States for lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3). Accordingly, plaintiffs' motions for partial summary judgment on the United States discretionary function and actionable duty defenses are **MOOT.** (Docs. 26, 30.) Furthermore, the court declines to exercise jurisdiction over plaintiffs' pendent state claim against Tammy Footman, and thus, **DISMISSES** plaintiffs' action against Tammy Footman without prejudice.

It is **SO ORDERED** in Orlando, Florida, this 28th day of September, 1993.

/s/
G. KENDALL SHARP
United States District Judge

Copies to all counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-3317

D.C. Docket No. 92-474-Civ-ORL-18

BERTHA LEE FOOTMAN, individually and as Co-Personal Representative of the Estate of CHARLENE I. ROBINSON, deceased, BERESFORD ROBINSON, individually and as Co-Personal Representative of the Estate of CHARLENE I. ROBINSON, deceased,

Plaintiffs-Appellants,

versus

NATIONAL AERONAUTICS & SPACE ADMINISTRATION,

Defendant,

TAMMY FOOTMAN,

Defendant-Appellant,

UNITED STATES OF AMERICA

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(September 20, 1994)

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and PAINE*, Senior District Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiffs-appellants."

*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Judgment Entered: September 20, 1994
For the Court : Miguel J. Cortez, Clerk

By: /s/
Karleen McNobb, Deputy Clerk

ISSUED AS MANDATE: October 11, 1994

STATUTES INVOLVED IN THIS CASE

28 U.S.C.A. §1346(b). United States as Defendant:

Subject to the provisions of chapter 171 of this chapter the district courts together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. §2671. Definitions:

As used in this chapter and sections 1346(b) and 2401(b) of this title the term "Federal Agency" includes the executive departments, the judicial and legislative branches, the military department, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504 or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32 means acting in the line of duty.

28 U.S.C.A. §2674. Liability of United States:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide for damages only

punitive in nature, the United States shall be liable to actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claims to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C.A. §2680(a). Exceptions:

The provisions of this chapter in section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused.

(2)

No. 94-1151

Supreme Court, U.S.
FILED
FEB 27 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

BERTHA FOOTMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK B. STERN
JENNIFER HAY ZACKS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

15pp

QUESTION PRESENTED

Whether petitioners' tort claims against the government, which are based on the allegedly negligent management of a swimming area on federal property, are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Autery v. *United States*, 992 F.2d 1523 (11th Cir. 1993), cert. denied, 114 S. Ct. 1829 (1994)	6
Ayer v. *United States*, 902 F.2d 1038 (1st Cir. 1990)	6
Baum v. *United States*, 986 F.2d 716 (4th Cir. 1993)	6, 8
Berkovitz v. *United States*, 486 U.S. 531 (1988)	5, 8
Black Hills Aviation, Inc. v. *United States*, 34 F.3d 968 (10th Cir. 1994)	8
Butler v. *United States*, 726 F.2d 1057 (5th Cir. 1984)	9
Caraballo v. *United States*, 830 F.2d 19 (2d Cir. 1987)	9
Fisher Brothers Sales, Inc. v. *United States*, No. 93-1182 (3d Cir. Jan. 25, 1995)	8
Huber v. *United States*, 838 F.2d 398 (9th Cir. 1988)	10
Indian Towing Co. v. *United States*, 350 U.S. 61 (1955)	7, 8
Ingham v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967)	9
Kiehn v. *United States*, 984 F.2d 1100 (10th Cir. 1993)	6
Mandel v. *United States*, 793 F.2d 964 (8th Cir. 1986)	9
Rise v. *United States*, 630 F.2d 1068 (5th Cir. 1980)	10
Ross v. *United States*, 640 F.2d 511 (5th Cir. 1981)	9
Seaboard Coast Line R.R. v. *United States*, 473 F.2d 714 (5th Cir. 1973)	9
United States v. *Gaubert*, 499 U.S. 315 (1991)	4, 5, 6, 7, 8, 9
United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)	6
Wiggins v. *United States*, 799 F.2d 962 (5th Cir. 1986)	9

Statute: Page

Federal Tort Claims Act:
28 U.S.C. 1346(b) 3
28 U.S.C. 2671 *et seq.* 3
28 U.S.C. 2680(a) 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1151

BERTHA FOOTMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A13-A14) is unpublished, but the decision is noted at 37 F.3d 636 (Table). The opinion of the district court (Pet. App. A1-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1994. Pet. App. A13-A14. The petition for a writ of certiorari was filed on December 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 9, 1990, while attending a picnic with her family, seven-year-old Charlene Robinson drowned in a lake at the Kennedy Athletic, Recreation and Social (KARS) Organization Park No. 1. The park is on property owned by the United States National Aeronautics and Space Administration (NASA), and it is operated by the NASA Exchange—Kennedy Space Center (the Exchange), a non-appropriated fund instrumentality of the United States. The Exchange established the KARS Organization to promote recreational activities for NASA employees at the Kennedy Space Center. Pet. App. A2, A4-A5.

At the time of the accident, Mitchell Tidwell was responsible for the operation of the park, including its swimming area. Tidwell had received no instructions from the Exchange or the KARS Organization about lifeguard training or qualifications. In 1970, before Tidwell was hired, the KARS Organization had issued instructions for training lifeguards. Pet. App. A3, A4. The district court, however, found "no evidence that the Exchange or KARS organization informed Tidwell that he was required to enforce the 1970 lifeguard instructions," and that "the Exchange and KARS organization allowed Tidwell unfettered discretion as to hiring and training lifeguards." *Id.* at A8. Petitioners do not challenge those findings in this Court. See Pet. 15. In 1990, Tidwell hired lifeguards who lacked lifesaving or CPR certification, neither of which was required by state law at the time. Pet. App. A4; Gov't C.A. Br. 14-15.

2. Petitioners filed this action in the United States District Court for the Middle District of Florida on their own behalf and as representatives of Charlene's estate. They sought damages from the United States

under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, alleging negligence in the operation of the swimming area of the park.[1] The government argued, among other things, that petitioners' claims are barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).[2] The district court entered judgment for the government. Pet. App. A1-A12.

---

[1] Petitioners also alleged pendent state-law claims against Tammy Footman. The district court declined to exercise jurisdiction over those claims after holding that petitioners' claims against the United States had to be dismissed. Pet. App. A2, A11-A12. The district court's dismissal of the pendent claims is not at issue in this Court.

[2] The FTCA generally waives the sovereign immunity of the United States from claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b). That waiver is subject to certain exceptions. The exception relevant here, the discretionary function exception, 28 U.S.C. 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The district court used the two-part approach for applying the discretionary function exception set out in *United States* v. *Gaubert*, 499 U.S. 315 (1991). Pet. App. A6. The district court explained that, under that approach, a court "must first determine whether the challenged conduct violates a mandatory regulation or policy that allowed no judgment or choice"; if no such regulation or policy exists, such that the conduct is discretionary, a court then "must determine whether the challenged actions are the kind of conduct that the discretionary function exception was designed to shield." *Id.* at A7.

The district court determined that no mandatory regulations or policies governed decisions regarding the hiring or training of lifeguards at the swimming area. Pet. App. A8. Instead, as noted above, the court found that "the Exchange and KARS organization allowed Tidwell unfettered discretion as to hiring and training lifeguards." *Ibid.* The court also determined that Tidwell's conduct was the type of conduct protected by the discretionary function exception. The court explained that "[t]he evidence show[ed]" that decisions regarding the lifeguards entailed a balancing of "safety factors and resource allocation." *Id.* at A10.

3. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's judgment in an unpublished per curiam order. Pet. App. A13-A14.

ARGUMENT

The district court correctly determined, in a decision upheld without opinion by the court of appeals, that the question whether petitioners' claims are barred by the discretionary function exception to the FTCA is governed by the two-part approach this Court most recently enunciated in *United States* v. *Gaubert*, 499

U.S. 315 (1991). The district court's application of the *Gaubert* analysis to the facts of this case does not raise any question of broad legal importance and is consistent with decisions of other courts of appeals involving similar facts. Further review is therefore unwarranted.

1. "The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). As this Court explained in *Gaubert*, "[t]he exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). "Furthermore, even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz*, 486 U.S. at 536).

The district court in this case properly applied these well-established principles by considering, first, whether the government conduct on which petitioners' claims are based was discretionary. Pet. App. A7-A8. The court correctly answered that question in the affirmative. *Id.* at A8. Petitioners now "concede that no mandatory regulations deprived [Tidwell] of discretion" in operating the swimming area. Pet. 15-16.

Having determined that the challenged governmental conduct was discretionary, the district court correctly turned to the question whether it involved the type of discretion protected by the discretionary function exception. Pet. App. A8-A11. The district court found that "[t]he evidence show[ed]" that the challenged decisions regarding the lifeguards "involved safety factors and resource allocation." *Id.* at A10. As the district court recognized, the consideration of such

factors has been held to bring a governmental decision within the scope of the discretionary function exception in cases, like this one, involving alleged governmental negligence in the maintenance of recreational sites on government-owned land. *Ibid.* (citing *Autery* v. *United States*, 992 F.2d 1523, 1527 (11th Cir. 1993), cert. denied, 114 S. Ct. 1829 (1994)); see also, *e.g.*, *Kiehn* v. *United States*, 984 F.2d 1100, 1103-1108 (10th Cir. 1993); *Baum* v. *United States*, 986 F.2d 716 (4th Cir. 1993); *Ayer* v. *United States*, 902 F.2d 1038 (1st Cir. 1990).[3]

Petitioners contend that the discretionary function exception is inapplicable because Tidwell's position was "so low" that he was "only concerned with day-to-day management," and "not [with] pondering the social, economic or political implications of his decisions." Pet. 16. This Court made clear in *Gaubert*, however, that "[i]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies." *Gaubert*, 499 U.S. at 325 (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), and rejecting argument that exception did not apply because bank regulator was merely involved in "[d]ay-to-day management of banking affairs"). The Court also made clear in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion * * *, but on the nature of the

---

[3] Having held that the government's conduct fell within the discretionary function exception, the district court found it unnecessary to decide whether that conduct breached a duty of care to Charlene Robinson. Pet. App. A2. Petitioners thus mischaracterize the district court's decision in asserting that the court relied on the exception to find that "the government did not owe the patrons of th[e] [swimming] facility any duty of reasonable care." Pet. 9.

actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Thus, petitioners' conception of the discretionary function exception cannot be squared with *Gaubert*.

2. Petitioners contend (Pet. 9) that the decisions below "directly conflict[]" with *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). According to petitioners, *Indian Towing* stands for the broad proposition that, "where government voluntarily assumes a function not mandated by statute or regulation, it has an absolute duty to perform that function with reasonable care." Pet. 9. Petitioners also contend that lower courts have applied "[t]he 'good samaritan' rule established by this Court in *Indian Towing*" to hold the government liable on facts similar to those of this case. Pet. 12-13.

Petitioners confuse two quite separate issues. The good samaritan rule is a principle of tort liability embodied in the substantive law of many States. When the discretionary function exception applies, however, such substantive rules of liability do not come into play. Thus, even if the law of Florida (where the accident in this case occurred) imposed a "good samaritan" rule of the sort that petitioners attribute to *Indian Towing*, the question whether the challenged government action violated that rule does not arise if the discretionary function exception to the FTCA preserved the government's sovereign immunity from tort liability. The district court recognized as much when, after holding that the exception applies here, it declined to address whether the government had breached a standard of care. Pet. App. A2, A10-A11.

Moreover, *Indian Towing* does not establish a good samaritan rule as the test for determining the applicability of the discretionary function exception. The plaintiff there sought damages from the United States

for allowing the light in a lighthouse to go out. *Indian Towing*, 350 U.S. at 62. As this Court noted, the government did not argue that recovery was barred by the discretionary function exception to the FTCA. *Id.* at 64. Instead, the government unsuccessfully argued that recovery was barred because operating a lighthouse was a "uniquely governmental function[]." *Ibid.* Thus, the Court in *Indian Towing* had no occasion to address the scope of the discretionary function exception.

This Court has subsequently noted that *Indian Towing* nonetheless "illuminates the appropriate scope" of the discretionary function exception. *Berkovitz*, 486 U.S. at 538 n.3. The Court has explained that "[t]he United States was held liable" in *Towing* "because making sure the light was operational 'did not involve any permissible exercise of policy judgment.'" *Gaubert*, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3). Thus, *Indian Towing* illustrates a governmental decision that was not shown to involve discretion of the sort protected by the discretionary function exception. Nothing in *Indian Towing* suggests that, whenever the government voluntarily provides a service, it will be liable for injury caused by negligence in providing that service, even when the allegedly negligent conduct *does* involve the type of discretion protected by the exception. Accordingly, many lower courts have correctly refused to give *Indian Towing* a reading of the sort urged by petitioners. See, *e.g.*, *Fisher Brothers Sales, Inc.* v. *United States*, No. 93-1182 (3d Cir. Jan. 25, 1995) (en banc), slip op. 16; *Black Hills Aviation, Inc.* v. *United States*, 34 F.3d 968, 977 (10th Cir. 1994); *Baum*, 986 F.2d at 723.

Petitioners cite (Pet. 12-13) lower court decisions that they contend support their reading of *Indian Towing*. Petitioners' reliance on those decisions, all of which pre-

date *Gaubert*, is misplaced. Most of the decisions cited by petitioners rely on the same "nonexistent dichotomy between discretionary functions and operational activities" rejected in *Gaubert*, 499 U.S. at 326.[4] Two of the decisions cited by petitioners refused to apply the discretionary function exception because the challenged conduct violated a mandatory government policy, a circumstance that did not obtain here.[5] One decision cited by petitioners held that the challenged government conduct fell within the exception. See *Wiggins* v. *United States*, 799 F.2d 962, 966-967 (5th Cir. 1986) (exception applied to government's decision not to clear submerged piling from waterway, based on balancing economic and safety factors). Another decision cited by petitioners (Pet. 13), *Ross* v. *United States*, 640 F.2d 511, 519 (5th Cir. 1981) (per curiam), did not discuss the exception.

---

[4] See *Caraballo* v. *United States*, 830 F.2d 19, 21-22 (2d Cir. 1987) (government could be held liable for implementation of discretionary decision to patrol diving area); *Mandel* v. *United States*, 793 F.2d 964, 968 (8th Cir. 1986) (government's failure to remove submerged rocks in waterway "involves operational level negligence at best"); *Butler* v. *United States*, 726 F.2d 1057, 1063 (5th Cir. 1984) (government could be held liable for "operational function[]" of repairing seawall); *Seaboard Coast Line R.R.* v. *United States*, 473 F.2d 714, 716 (5th Cir. 1973) (government could be held liable for "operational function of building [a] drainage ditch").

[5] *Mandel*, 793 F.2d at 967 (challenged government conduct was not within the exception because it was "operational" and, in the alternative, because it violated safety policy); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227, 233-236 (2d Cir.) (challenged government conduct violated Federal Aviation Administration Air Traffic Control Procedures Manual), cert. denied, 389 U.S. 931 (1967).

Finally, the remaining two decisions cited by petitioners are distinguishable on their facts.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK B. STERN
JENNIFER HAY ZACKS
Attorneys

FEBRUARY 1995

---

[6] In *Huber* v. *United States*, 838 F.2d 398, 400-401 (9th Cir. 1988), the court held that an allegedly negligent attempt by the Coast Guard to rescue a ship did not involve discretion of the sort protected by the exception. In *Rise* v. *United States*, 630 F.2d 1068, 1072 (5th Cir. 1980), the court held that the exception did not bar allegedly negligent medical care.

SUPREME COURT, U.S.
FILED
MAR 1 3 1995
OFFICE OF THE CLERK

CASE NO. 94-1151

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

Bertha Lee Footman and
Beresford Robinson,
Individually and as
Co-Personal Representatives
of the Estate of Charlene
I. Robinson, deceased,

Petitioners,

vs.

United States of America,
National Aeronautics and Space
Administration,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

Joseph H. Williams, Esquire
Counsel of Record for Petitioners
Troutman, Williams, Irvin, Green & Helms, P.A.
311 West Fairbanks Avenue
Winter Park, Florida 32789
(407) 647-2277

12 pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. When an unfunded instrumentality of the United States exercises its discretion to create, staff, and operate a swim facility, the government has a duty to use reasonable care to safeguard paying guests. When a small child drowns at that facility, in part because of the use of unqualified "lifeguards" and other negligent management of the facility, the lower courts' refusal to allow an action against the government based on the discretionary function exception to the Federal Tort Claims Act constitutes a departure from the accepted and usual force of judicial proceedings in direct conflict with authority flowing from this court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and with decisions of other United States Courts of Appeals.

II. When the government's uncontradicted evidence establishes that a low-level employee of an unfunded instrumentality of the United States is without discretion in matters affecting the social, economic, or political policy of the United States government in the management of a swimming facility in decisions involving the hiring of personnel and the day-to-day management of the facility, and the lower courts determined him to have possessed and exercised such discretion, then the lower courts departed from, or sanctioned the departure from, the accepted and usual force of judicial proceedings in conflict with this court's decisions in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991), Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984); and, Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988).

TABLE OF CONTENTS

Argument

Point I 1-4

Point II 4-7

Conclusion 7

TABLE OF AUTHORITIES

CASES:

Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986) 1

Ayer v. United States 902 F.2d 1038 (1st Cir. 1990) 6

Baum v. United States, 986 F.2d 716 (4th Cir. 1993) 6

Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988) i

Black Hills Aviation, Inc. v. United States, 34 F.3d 968 (10th Cir. 1994) 3

Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) i

Fisher Brother Sales, Inc. v. United States, #93-1182 (3rd Cir. Jan. 25, 1995) (en banc), 1995 WL29865 2

Ide v. City of St. Cloud, 8 So.2d 924 (Fla. 1942) 1

Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955) i, 1, 3

Kiehn v. United States, 984 F.2d 1100 (10th Cir. 1993) 5

United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991) i, 2

United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984) i, 2

STATUTES

28 U.S.C. 1346(b) 1

28 U.S.C. 2671 et seq. 2

ARGUMENT

POINT I

The United States' assertion that Petitioners confuse "two quite separate issues" (OP7), with reference to the application of this Court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), misses the point made by Petitioners in every court in which this question has been argued. Petitioners have no argument with the assertion that the good samaritan rule is a principle of tort liability.[1] What the United States has failed to acknowledge is that the relationship between the discretionary function exception to the Federal Tort Claims Act [28 U.S.C. 1346(b), 2671, et seq.] and the Good Samaritan Rule is a temporal relationship. As this Court recognized in Indian Towing, it is not until after the government's discretionary decision is made and the activity engaged in, that the duty imposed by Indian Towing on government engaging in day-to-day operations arises.

In this case, that discretionary decision to operate the swimming facility was made decades before Charlene

---

[1]As speculated by the Respondent, the law of Florida does impose a good samaritan rule on government: Ide v. City of St. Cloud, 8 So.2d 924 (Fla. 1942) (City operating park with bathing beach owes duty to exercise due care for safety of persons invited there); Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986) (Once government decides to operate a swimming facility, it assumes a common-law duty to operate the facility safely, just as a private individual is obligated under like-circumstances).

Robinson's death. The day-to-day operations of the swimming facility had already resulted in two previous deaths prior to that of Charlene Robinson. Outside of the regulatory area, Petitioners have found no authority that would make day-to-day decisions concerning the operating of a recreational facility which charges an entrance fee to members of the public subject to the discretionary function exception.

In attempting to bolster its argument, the United States has failed to address the distinction between those cases involving the regulatory functions of government,[2] and those cases involving the non-regulatory exercise of discretion in the day-to-day operations of the government or its instrumentalities. This case clearly did not involve the type of regulatory activity that is seen in cases such as Gaubert, and Varig Airlines. Here, the discretionary decision to operate the facility was made more than 20 years before this child's death.

In its opposition, the government indicates reliance on cases which are distinguishable. In Fisher Brother Sales, Inc. v. United States, #93-1182 (3rd Cir. Jan. 25, 1995)(en banc), 1995 WL29865, Plaintiffs challenged the decision of the Commissioner of the Food and Drug Administration, an agency head, as opposed to a decision of a low-level "handy man" who

[2]United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991); United States v. Varig Airlines, 467 U.S. 797 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984).

was not even on the United States' payroll. Fisher Brothers Sales, involved an imminent threat to the public health of the United States with a compressed time period, not the negligent implementation of a decision to operate a recreational facility made more than two decades before. Further, this case involved the exercise of the government's regulatory function, as discussed above, rather than day-to-day activities in the operation of a facility open to paying guests.

Respondent also indicates reliance on the decision in Black Hills Aviation, Inc. v. United States, 34 F.3d 968 (10th Cir. 1994), which is clearly factually distinguishable. Black Hills Aviation dealt with a one-time event, a plane crash, and the compressed time period following that crash concerning the investigations conducted by the government, not the decades-long operation of a recreational facility. Black Hills Aviation contained clear national security implications, as opposed to the operation of a public swimming facility. Finally, the court in Black Hills Aviation, interpreted this court's decision in Indian Towing in a manner which was in conflict with cases decided by the Second and Fifth Circuit Courts of Appeals. Thus, this case cannot have any persuasive effect on the determination of this question, but again illustrates the need for this Court to provide for uniformity in the various circuits on this question.

The United States has failed to demonstrate the manner in which this Court's decision in Indian Towing does not apply to these facts. On the one hand, the government's negligent failure to maintain a light house years after the discretionary decision was made to operate that facility is actionable. On the other, the United States insists that the negligent failure of its agents to safely operate a swimming facility decades after the discretionary decision to operate that facility was made is not actionable. There is no rational basis given by the United States to allow the barge company to recover for damages to its vessel in one instance, and to deny recovery to the survivors of this drowned child in the other.

POINT II

Petitioners have no quarrel with the "black letter" law explicating the analytical model used to determine whether application of the discretionary function exception is mandated in a particular factual situation (OP4-5).

However, the United States fails to address the absence of any evidence to support the District Court's finding that the challenged decisions regarding the lifeguards "involved safety factors and resource allocation" (OP5). As the evidence extracted in the petition clearly showed, the "employee", did not receive a government paycheck; was not allowed to serve on his employer's policy-making body; did not make budgetary

decisions; and was not even allowed to manage the receipts of the park he managed. In the face of this uncontradicted evidence, the unsupported conclusion that his decisions "involved safety factors and resource allocation" finds no support in the record.

The cases upon which the United States relies to support its argument on this point are distinguishable. In Kiehn v. United States, 984 F.2d 1100 (10th Cir. 1993), a rafting trip leader fell on a natural rock formation in a national monument area and brought claim against the government for its negligent failure to warn of the danger and the negligent rescue efforts. The Court determined the discretionary function exception applied to the facts of that case.

There, a remote natural site was involved. In the present case, the site was specifically created by the United States, surrounded by a fence, and staffed with employees called "lifeguards" for the explicit purpose of saving the lives of drowning children. In Kiehn, there were limited resources available, while in the present case adequate personnel had been budgeted to handle the emergency if properly trained and not negligent. In Kiehn, with reference to the failure to warn claim, the decision not to take action is one that is clearly discretionary. Here, the United States determined to act and then engaged in day-to-day operations which ultimately caused

three deaths. This case illustrates the different interpretations of the application of the discretionary function exception among the circuits.

In Baum v. United States, 986 F.2d 716 (4th Cir. 1993), the persons claiming against the government were occupants of a car that went through a guardrail on a National Park Service parkway and brought claim for negligent construction and design, involving the choice of materials, and for negligent repair, in the replacement of the guardrails. The courts determined those choices were protected by the discretionary function exception. Clearly, questions dealing with the design and construction of a facility are discretionary, where the decisions involving the day-to-day operations of a swimming facility do not involve that kind of discretion. In Baum, the question was of an initial allocation of resources, unlike the negligent use of resources already allocated in the present case.

In Ayer v. United States, 902 F.2d 1038 (1st Cir. 1990), a civilian visitor was injured in a fall at an Air Force missile launch facility and brought claim alleging negligent failure to make safety changes to protect invited guests. The court held the discretionary function exception protected that decision. Again, a discretionary decision not to employ safety appliances (guardrails), was explicitly based on policy criteria to allow the facility to survive a nuclear attack. In the present case, the

ongoing staffing and operation of the recreational facility did not involve any of those kinds of policy considerations. In Ayer, clear national policy implications were involved, versus the day-to-day operations of a recreational facility which were involved in this case.

The United States has been successful in surrounding the kernel at the core of this case with layers of rhetoric about the discretionary function exception. When all of those layers are peeled away, what is left is that the life of a seven year old child was sacrificed because of negligent decisions made in the day-to-day operation of the recreational facility. The evidence was clear that resources had been allocated to properly staff and operate the facility and that was not done.

CONCLUSION

This court must accept jurisdiction of this cause to fully review the facts and circumstances surrounding this case; to reestablish the principle that, when the United States voluntarily determines to engage in an activity, the day-to-day operations which are negligently performed are not protected by the discretionary function exception; and, alternatively to issue a decision giving all courts in the system guidance as to the level beyond which discretion based on considerations of social, economic, and political issues may not reach.

Respectfully Submitted,

Joseph H. Williams, Esquire
Florida Bar No. 166106
TROUTMAN, WILLIAMS, IRVIN, GREEN
& HELMS, P.A.
311 West Fairbanks Avenue
Winter Park, Florida 32789
(407) 647-2277
Counsel of Record for Petitioners

March 1995